UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

AJD, INC., A McDONALD'S FRANCHISEE, AND McDONALD'S USA, LLC, JOINT EMPLOYERS	**Cases: 02-CA-093895 02-CA-097827**
LEWIS FOODS OF 42ND STREET, LLC, A McDONALD'S FRANCHISEE, AND McDONALD'S USA, LLC, JOINT EMPLOYERS	**Cases: 02-CA-093893 02-CA-098662**
18884 FOOD CORP., A McDONALD'S FRANCHISEE, AND McDONALD'S USA, LLC, JOINT EMPLOYERS	**Cases: 02-CA-094224 02-CA-098676**
14 EAST 47TH STREET, LLC, A McDONALD'S FRANCHISEE, AND McDONALD'S USA, LLC, JOINT EMPLOYERS	**Cases: 02-CA-094679 02-CA-098604**
JOHN C FOOD CORP., A McDONALD'S FRANCHISEE, AND McDONALD'S USA, LLC, JOINT EMPLOYERS	**Cases: 02-CA-093927 02-CA-098659**
840 ATLANTIC AVENUE, LLC, A McDONALD'S FRANCHISEE, AND McDONALD'S USA, LLC, JOINT EMPLOYERS	**Case: 02-CA-097305**
1531 FULTON STREET, LLC, A McDONALD'S FRANCHISEE, AND McDONALD'S USA, LLC, JOINT EMPLOYERS	**Cases: 02-CA-103771 02-CA-112282**
McCONNER STREET HOLDING, LLC, A McDONALD'S FRANCHISEE, AND McDONALD'S USA, LLC, JOINT EMPLOYERS	**Case: 02-CA-098809**
McCONNER STREET HOLDING, LLC, A McDONALD'S FRANCHISEE, AND McDONALD'S USA, LLC, JOINT EMPLOYERS	**Case: 02-CA-103384**
MIC-EASTCHESTER, LLC, A McDONALD'S FRANCHISEE, AND McDONALD'S USA, LLC, JOINT EMPLOYERS	**Case: 02-CA-103726**
BRUCE C. LIMITED PARTNERSHIP, A	**Case: 02-CA-106094**

McDONALD'S FRANCHISEE, AND McDONALD'S USA, LLC, JOINT EMPLOYERS		
and		
FAST FOOD WORKERS COMMITTEE AND SERVICE EMPLOYEES INTERNATIONAL UNION, CTW, CLC JO-DAN MADALISSE LTD, LLC d/b/a MCDONALD'S, A FRANCHISEE OF MCDONALD'S USA, LLC and MCDONALD'S USA, LLC Joint Employers	**Cases**	**04-CA-125567 04-CA-129783 04-CA-133621**
and		
PENNSYLVANIA WORKERS ORGANIZING COMMITTEE, A PROJECT OF THE FAST FOOD WORKERS COMMITTEE		
and		
KARAVITES RESTAURANTS 11102, LLC, A McDONALD'S FRANCHISEE, AND McDONALD'S, USA, LLC, JOINT EMPLOYERS	**Case**	**13-CA-106490**
KARAVITES RESTAURANTS 26, INC., A McDONALD'S FRANCHISEE, AND McDONALD'S, USA, LLC, JOINT EMPLOYERS	**Case**	**13-CA-106491**
RMC LOOP ENTERPRISES, LLC, A McDONALD'S FRANCHISEE, AND McDONALD'S USA, LLC, JOINT EMPLOYERS	**Case**	**13-CA-106493**
WRIGHT MANAGEMENT, INC., A McDONALD'S FRANCHISEE, AND McDONALD'S, USA, LLC, JOINT EMPLOYERS	**Cases**	**13-CA-107668 13-CA-113837**
V. OVIEDO, INC., A McDONALD'S FRANCHISEE, AND McDONALD'S USA, LLC, JOINT EMPLOYERS	**Cases**	**13-CA-115647 13-CA-119015 13-CA-123916 13-CA-124813 13-CA-131440**
McDONALD'S RESTAURANTS OF ILLINOIS, INC.	**Cases**	**13-CA-117083 13-CA-118691 13-CA-121759**
LOFTON & LOFTON MANAGEMENT V, INC., A McDONALD'S FRANCHISEE, AND McDONALD'S USA,	**Case**	**13-CA-118690**

LLC, JOINT EMPLOYERS		
K. MARK ENTERPRISES, LLC, A McDONALD'S FRANCHISEE, AND McDONALD'S USA, LLC, JOINT EMPLOYERS	**Cases**	**13-CA-123699** **13-CA-129771**
NORNAT, INC., A McDONALD'S FRANCHISEE, AND McDONALD'S USA, LLC, JOINT EMPLOYERS	**Case**	**13-CA-124213**
KARAVITES RESTAURANT 5895, INC., A McDONALD'S FRANCHISEE, AND McDONALD'S, USA, LLC, JOINT EMPLOYERS	**Case**	**13-CA-124812**
TAYLOR & MALONE MANAGEMENT, A McDONALD'S FRANCHISEE, AND McDONALD'S, USA, LLC, JOINT EMPLOYERS	**Case**	**13-CA-129709**
RMC ENTERPRISES, LLC, A McDONALD'S FRANCHISEE, AND McDONALD'S USA, LLC, JOINT EMPLOYERS	**Case**	**13-CA-131141**
KARAVITES RESTAURANT 6676, LLC, McDONALD'S FRANCHISEE, AND McDONALD'S USA, LLC, JOINT EMPLOYERS	**Case**	**13-CA-131143**
TOPAZ MANAGEMENT, INC., A McDONALD'S FRANCHISEE, AND McDONALD'S USA, LLC, JOINT EMPLOYERS	**Case**	**13-CA-131145**
and		
WORKERS ORGANIZING COMMITTEE OF CHICAGO		
and		
MAZT, INC., A McDONALD'S FRANCHISEE, AND McDONALD'S USA, LLC, AS JOINT EMPLOYERS	**Cases**	**20-CA-132103** **20-CA-135947** **20-CA-135979**
and		**20-CA-137264**
WESTERN WORKERS ORGANIZING COMMITTEE OF CHICAGO		
FAITH CORPORATION OF INDIANAPOLIS, A McDONALD'S FRANCHISEE, AND McDONALD'S USA, LLC, JOINT EMPLOYERS	**Cases**	**25-CA-114819** **25-CA-114915** **25-CA-130734** **25-CA-130746**
and		

WORKERS ORGANIZING COMMITTEE OF CHICAGO

and

D. BAILEY MANAGEMENT COMPANY, A McDONALD'S FRANCHISEE, AND McDONALD'S USA, LLC AS JOINT EMPLOYERS	**Cases 31-CA-127447 31-CA-130085 31-CA-130090 31-CA-132489 31-CA-135529 31-CA-135590**
2MANGAS INC., A McDONALD'S FRANCHISEE, AND McDONALD'S USA, LLC AS JOINT EMPLOYERS	**Cases 31-CA-129982 31-CA-134237**
SANDERS-CLARK & CO., INC, A McDONALD'S FRANCHISEE, AND McDONALD'S USA, LLC AS JOINT EMPLOYERS	**Cases 31-CA-128483 31-CA-129027 31-CA-133117**

And

LOS ANGELES ORGANIZING COMMITTEE

D. BAILEY MANAGEMENT COMPANY, INC.'S MOTION TO SEVER

D. Bailey Management Company, Inc., (hereinafter "Bailey"), files this Motion to Sever pursuant to the National Labor Relations Board (hereinafter "Board") Rules and Regulations, Section 102.33(d), and respectfully requests the Administrative Law Judge ("ALJ") order severance of these proceedings such that the cases against Bailey are consolidated with each other but severed from those cases involving separate independent Franchisees, which are not even alleged to have any joint employment relationship with Bailey.

BACKGROUND

Bailey is a Franchisee that independently operates a franchise of McDonald's USA, LLC ("McDonald's") at 1071 W. Martin Luther King Boulevard, Los Angeles, California 90037. Owners Lois and Don Bailey have operated this restaurant, which employs approximately 60 individuals, since 1990. Bailey makes all employment decisions concerning the restaurant including hiring and termination, as well as all employee wages, discipline, and schedules.

The Workers Organizing Committee of Chicago, ("Charging Party") filed an unfair labor practice charge alleging that Bailey violated Section 8(a)(1) and Section 8(a)(3) of the National Labor Relations Act ("Act"). Specifically, Charging Party allege that Bailey disciplined employee Elmer Munoz because he engaged in concerted activity. Charging Party further alleges that Bailey maintained rules against fraud, false statements, solicitation, and breaching confidentiality during investigations in the Employee Handbook. Bailey denies each of these charges, and looks forward to the opportunity to defend itself against each allegation.

Notwithstanding the relatively straightforward factual and legal premise of the case against Bailey, the company's ability to present its case and resolve Charging Party's claims has been severely prejudiced by the General Counsel's decision to consolidate 61 unfair labor practice charges, across 5 states, involving 21 different independent operators, operating 30 different restaurants. Rather than simply being evaluated on the merits of the allegations against Bailey and promptly developing a strategy for resolution, Bailey has been dragged into this unmanageable morass involving parties, practices, and factual allegations that are wholly unrelated to the straightforward claims against Bailey, and unrelated to the alleged joint employer relationship between Bailey and McDonald's.[1]

There simply is no factual connection between the complaints themselves to justify consolidation. Rather, the sole factor these cases have in common is the "McDonald's" brand name. This, in and of itself, does not serve as a basis for consolidation. The General Counsel's decision to consolidate these cases is an extraordinary abuse of discretion given the

[1] A readily apparent example of the inherent and insurmountable difficulties with consolidating and litigating all 61 charges in this amalgamated manner is the Region 2's failure to timely serve Bailey the Order Consolidating Cases. On January 5, 2015, the General Counsel transferred cases from Regions 4, 13, 20, 25, and 31 to the Regional Director for Region 2. On January 6, 2015, the Regional Director consolidated the transferred cases into one hearing with the cases already consolidated in Region 2. Bailey was not served with copies of the General Counsel's Order. Fifteen days later, and only after counsel for Bailey contacted the Field Attorneys in Region 31 and Region 13 to inquire about lack of service, did the General Counsel finally serve Bailey. This oversight is representative of the General Counsel's failure to recognize the manner in which its actions affect Bailey, and each of the independent Franchisees across the country.

particularized nature of Bailey's case, as well as that of each Franchisee's case(s), and given the high propensity for prejudice to each party's ability to effectively present evidence free of conflation with separate cases and legal issues. The General Counsel's unprecedented action undermines the purpose of the Act, and the ALJ should sever the consolidated charges such that all charges against Bailey are consolidated with each other but are not consolidated with charges involving separate and distinct Franchisees.

ARGUMENT

I. THE CONSOLIDATION VIOLATES BOARD RULE 101.10 ON THE LOCATION OF THE HEARINGS.

The General Counsel's consolidation violates Board Rule 101.10 which provides that "[e]xcept in extraordinary situations the hearing is …usually conducted in the Region where the charge originated." The General Counsel offers no basis for violating this rule. There are no extraordinary circumstances present to justify hearing cases from six different Regions at various locations around the country.

The General Counsel has proposed that one ALJ travel around the country to preside over proceedings as follows: (1) the ALJ will hear the Region 2 and Region 4 complaints in New York; (2) the same ALJ will then travel to Chicago to hear the Region 13 and Region 25 complaints; and, (3) the same ALJ will then travel to Los Angeles to hear both the Region 20 and the Region 31 complaints. Incredibly, despite this phased process, the record will remain open for the duration of the entire trial, thus forcing all parties to participate in this traveling hearing process. This is an incredible expense for the parties involved and is not justified by any prevailing extraordinary situation or interest. Indeed, each Franchisee is facing a series of fairly simple, but factually specific claims which will require individual adjudication. The joint employer issue will require an examination of McDonald's relationship with each individual

Franchisee, specific to the claims against it. Not only will consolidation not provide greater efficiency in hearing these matters, it will, on the contrary, dramatically increase the time and expense of resolution of each of these claims. Accordingly, commensurate with Board Rule 101.10, the ALJ should order the severance of this case as to Bailey and each independent Franchisee. The cases against Bailey, and each independent Franchisee, should be heard in their respective Regions.

II. THE CONSOLIDATION OF THESE FACTUALLY DISTINCT CASES IS AN ABUSE OF DISCRETION BY THE GENERAL COUNSEL.

Board Rule § 102.33(a) gives the General Counsel discretion to consolidate cases where "necessary in order to effectuate the purpose of the Act or to avoid unnecessary costs or delay." This discretion, however, is not unbounded and is subject to review for an abuse of discretion. *See Service Employees Union, Local 87 (Cresleigh Management, Inc.),* 324 NLRB 774, 774 (1997). Further, Board Rule § 102.35(a)(8) gives the ALJ the authority to "upon motion order proceedings consolidated or severed." The ALJ should exercise her authority to sever the consolidated cases such that all cases against each independent Franchisee are consolidated with each other, but are severed from those cases involving separate Franchisees.

The Board has repeatedly held that consolidation is inappropriate where, as here, the cases involve different units of employees and different factual backgrounds. *See e.g., Accent Maintenance Corporation*, 303 NLRB 294, 299-300 (1991) (denying a motion to consolidate cases where "the events of the Complaint are also distinct and involve separate issues of law and fact."); *Venture Packaging, Inc.*, 290 NLRB 1237, 1237 n.1 (1988) (denying a motion to consolidate cases where the charging parties and the issues in the cases differed); *c.f. Beverly California Corporation,* 326 NLRB 232, 236 (1998) (involving the "unprecedented" consolidation of 17 cases but where each charge was against one corporation and its wholly-

owned subsidiaries). In *United States Postal Service*, 263 NLRB 357, 367 (1982), for example, the Board upheld the ALJ's denial of a motion to consolidate two cases dealing with different post office branches. The ALJ explained that there was no indication that the charging party in one case had any contact with the respondent or the officials involved in the other case. *Id.; see also, The Dow Chemical Company*, 250 NLRB 748, 748 n.1 (1980) ("The motion to consolidate is hereby denied inasmuch as the cases involve different units of employees and raise issues which, in view of the varying allegations of the complaint and different factual backgrounds, are best considered separately."); *King Broadcasting Company*, 324 NLRB 332, 339 n.12 (1997) (denying a motion for consolidation where the case dealt with "development of subtle and extensive labor-management dynamics").

Similarly here, the parties involved, the claims, and the disputed practices, all vary amongst Franchisees. Notably, Bailey and each independent Franchisee maintains its own Employee Handbook, and its own work rules. The resolution of the claims against Bailey will require that Bailey present evidence pertaining to: (1) the factual circumstances surrounding the disciplinary action issued to Elmer Munoz in April 2014 (2) its policy and practice never to discipline employees for engaging in concerted activity (3) its policy and practice of never disciplining any employee for his or her communications related to disciplinary actions, or other terms and conditions of employment; (4) its practice of never disciplining any employee for their making "merely false" statements; and (5) its policy and practice to permit all lawful solicitation by employees on its premises. The employees and supervisors in question do not work for any of the other Franchisees in the consolidated complaint. Moreover, the events in question involve only Bailey and are only alleged to have occurred at its restaurant located at 29 E. 87th Street in Chicago, Illinois.

Indeed, each Franchisee in this consolidated complaint is addressing idiosyncratic claims, each of which include factual allegations unique to that independent Franchisee. Even where the joint employer issue is concerned, determining liability for McDonald's will require individual examination of the company's relationships, involvement, and level of knowledge relevant to the claims against each Franchisee. It is difficult to imagine a more disparate set of cases. As such, the ALJ should sever cases brought against separate and distinct Franchisees.

III. CONSOLIDATION PREJUDICES EACH PARTY'S ABILITY TO MOUNT A DEFENSE IN THIS ACTION.

Consolidation of these cases violates due process in that it severely prejudices each Franchisee's ability to defend against the claims asserted. Courts considering the propriety of consolidation look at whether it "den[ies] a party his due process right to prosecute his own separate and distinct claims or defenses without having them so merged in the claims or defenses of others that irreparable injury will result." *Garber v. Randell,* 477 F.2d 711, 716-717 (2d Cir. 1973); *see also In re Repetitive Stress Injury Litig.,* 11 F.3d 368, 373 (2d Cir. 1993) ("Although consolidation may enhance judicial efficiency, 'considerations of convenience and economy must yield to a paramount concern for a fair and impartial trial.'"). In *Malcolm v. Nat'l Gypsum Co.,* the court reversed the district court's consolidation of asbestos litigation noting the "dizzying amount of evidence" regarding each victim's work history, disease pathology, level of exposure, and location of exposure. *See Malcolm,* 995 F.2d 346, 349 (2d Cir. 1993); *see also Garber,* 477 F.2d at 716-717 (finding that consolidating the complaints of various plaintiff stockholders against numerous defendants presented issues of "serious prejudice" explaining that "to be joined with numerous unrelated claims by other purchasers against some 50-odd other defendants in one 'mixed bag' type of consolidated complaint would be fundamentally unfair…").

Here, the disparate issues involved and the sheer number of parties including 21 independent Franchisees, McDonald's, numerous Charging Parties, and countless witnesses create a due process concern. The presentation of evidence involving 61 unfair labor practice charges and the case-by-case adjudication of McDonald's as a joint employer, threatens to overwhelm the evidence Bailey will present in its own defense. While Bailey's evidence will be specific to its policies with regard to its store schedule and employee discipline, there is a great potential for confusion and conflation of the factual distinctions with other Franchisees. *See e.g., Arnold v. Eastern Air Lines,* 712 F.2d 899, 906 (4th Cir. 1983) (reversing a decision to consolidate cases and holding that "considerations of convenience may not prevail where the inevitable consequence to another party is harmful and serious prejudice."); *see also, Schneck v. IBM,* Case No. 92-4370 (GEB), 1996 U.S. Dist. LEXIS 10126, at *18 (D.N.J. June 24, 1996) (denying a motion to consolidate explaining that "[t]he critical facts and factual issues are unique to each case, and a consolidation of these individual factual issues would result in inevitable jury confusion and a trial setting highly prejudicial to IBM.").

It is undeniable that managing a trial of this magnitude, across the country for what will likely be years, and then issuing rulings in 61 different charges, will be an incredibly challenging task. While Bailey understands that the ALJ will strive for objectivity throughout the proceedings, it is also undeniable that hearing evidence regarding purported Section 8(a)(1) and 8(a)(3) violations against dozens of independent Franchisees around the county – which do not involve Bailey and which have no legal bearing on Bailey's liability – will prove prejudicial. Particularly where consolidation is not justified by the benefits of added efficiencies, it becomes an entirely unnecessary exercise.

Further, Bailey will be delayed in the resolution of its case by being forced to participate in wholly irrelevant proceedings. "Consolidation that would unnecessarily delay [another] case is inappropriate." *Wai Feng Trading Co. v. Quick Fitting, Inc.*, Case No. 13-033S/13-056S, 2014 U.S. Dist. LEXIS 117251, at *13 (D.R.I. May 30, 2014); *see also Accent Maintenance Corporation*, 303 NLRB at 300 (denying a motion to consolidate explaining that where a case was ripe for decision the parties "are entitled to have their respective rights and obligations determined with reasonable dispatch."). In Bailey's case in particular, the alleged 8(a)(1) and 8(a)(3) violations could be heard and resolved in an expeditious manner. Rather than simply presenting its defenses and receiving a timely determination on the allegation, resolution for Bailey will be delayed for years while the 60 other cases against McDonald's, McDonald's Restaurants of Illinois, Inc. and each independent Franchisee are litigated in New York, Chicago, and then Los Angeles. All the while, Bailey will be denied resolution on its own claims large and small, until this process concludes.

Bailey is also prejudiced by the additional time and cost that attending these protracted proceedings will require. The General Counsel's proposed regional phases of adjudication will still result in an enormous expenditure for Bailey. The New York hearings alone will involve all of the consolidated cases in Region 2 and 4 which include 20 charges, 11 independent Franchisees, and adjudication of McDonald's as a joint employer with each. Bailey must have a presence throughout the proceedings in order to present its defense, point out any relevant distinctions in the operation of its restaurant and its relationship with McDonald's, and participate in motion practice that may have a bearing on its case. The cost of this process, particularly as compared to the small proportion of claims at issue specifically relating to Bailey, creates a substantial fairness issue.

The General Counsel's consolidation has also completely stymied settlement discussions. Bailey is being forced to litigate a case involving run-of-the-mill 8(a)(1) and 8(a)(3) violations because the General Counsel is insistent on trying all joint employer cases together and will not permit Bailey to settle the case absent an admission by Bailey that it is a joint employer with McDonald's, which it is not. McDonald's has no authority to remedy the unfair labor practices at issue even if Bailey is found liable. The allegations do not involve any McDonald's employees or facilities that McDonald's operates. The joint employer issue is of such importance to Bailey and the viability of the franchise business model generally, that a required concession on this point effectively takes settlement off the table. Moreover, not only is the General Counsel forcing Bailey to litigate a case it would likely settle with a notice posting with little cost or delay to all parties in the absence of the joint-employer admission requirement, the General Counsel also now forces Bailey into a massive, complex trial involving dozens of unrelated corporate entities that will take years to resolve, the likes of which are unprecedented in any forum.

IV. CONTINUED CONSOLIDATION WILL RESULT IN AN UNMANAGEABLE HEARING PROCESS RIFE WITH DELAY.

The General Counsel's decision to consolidate should be guided by concerns for "effectuat[ing] the purposes of the Act or avoid[ing] unnecessary costs or delay." Board Rule § 102.33(a). Here, there are no common issues of fact that would achieve the efficiencies of consolidation. Severance of the cases against each distinct Franchisee to allow them to proceed separately will increase efficiency and avoid additional costs to the parties of participating in the litigation of wholly irrelevant issues. This type of consolidation, particularly where the cases do not involve a common set of facts or parties, will be completely unmanageable. At every stage of the hearing process, the consolidated cases will be susceptible to delay.[2]

[2] *See. e.g., CNN America, Inc.*, Case Nos. 05-CA-31828 and 05-CA-33125, reviewing whether CNN and its former subcontractor were joint employers under the Act. While this case concerned only two corporate entities and

The numerous parties involved will include counsel for each Franchisee, counsel for McDonald's, counsel for the General Counsel, and counsel for each of the Charging Parties. As stated previously, each of these parties will need to be present and participate at each stage of the consolidated proceedings in order to properly track the progress of the case and protect their interests throughout the hearing. Trial preparation will involve the exchange of likely millions of documents between the parties. The inevitable disputes over discovery will, no doubt, result in numerous delays to the overall proceedings.

Because each involved party will be entitled to question each witness, witnesses will need to be prepped to endure direct examination, as well as multiple rounds of cross examination. Further, given the numerous parties involved, any motion practice during the proceedings will also result in delays as the ALJ will be reviewing motions from each party involved, in making her rulings.

Finally, the post-hearing brief submissions of each party will delay final resolution of the various cases. Given the involvement of counsel for each Franchisee, counsel for McDonald's, counsel for the General Counsel, and counsel for each of the Charging Parties, there is the potential for more than 20 post-hearing briefs at the end of the proceedings. Severance of the cases such that all charges against a single Franchisee are consolidated with each other but not consolidated with charges involving separate and distinct Franchisees will decrease each of these inefficiencies and minimize the potential for delay to all of the parties.

CONCLUSION

(continued…)

two unfair labor practice charges, it took 82 days to try and involved "16,000 pages of transcript and over 1,300 exhibits." *CNN America, Inc.*, Case Nos. 05-CA-31828 and 05-CA-33125, 2008 WL 6524258, at *1 (N.L.R.B. Div. of Judges Nov. 19, 2008). This case was pending before the Board for over five years before the Board finally issued a decision on September 15, 2014. *See* 361 NLRB No. 47. By comparison, given the size of this case as currently consolidated, it is likely to take much longer than *CNN America, Inc.* to conclude.

For the foregoing reasons, Bailey respectfully requests the ALJ to order the severance of cases against each distinct Franchisee.

Dated: January 28, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, an attorney for Respondent D. Bailey Management Company, Inc., hereby certifies that she caused a true and correct copy of **D. Bailey Management Company, Inc.'s Motion to Sever** to be filed electronically filed with the National Labor Relations Board on January 28, 2015, effectuating service on the NLRB's Regional Office.

The undersigned attorney for Respondent D. Bailey Management Company, Inc. further certifies that on January 28, 2015, she caused a true and correct copy of **D. Bailey Management Company, Inc.'s Motion to Sever** to be served, via electronic mail (where indicated) and/or first-class mail in a postage prepaid, properly addressed envelope to the following addresses designated for this purpose, respectively:

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Dated: January 28, 2015

s/ Caralyn M. Olie
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